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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,

Petitioner,

v.

ARTURO R. RECUENCO,

Respondent.

On Writ of Certiorari to
the Supreme Court of Washington

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, IOWA, KANSAS, MAINE, MICHIGAN, MONTANA, OHIO, OKLAHOMA, OREGON, SOUTH DAKOTA, TENNESSEE, UTAH, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether error as to the definition of a sentencing enhancement should be subject to harmless error analysis where it is shown beyond a reasonable doubt that the error did not contribute to the verdict on the enhancement?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Washington Supreme Court's Decision Casts Serious Doubt On *Neder v. United States*. 5

A. Sentence-Enhancing Facts Are Functionally Equivalent To Elements For Purposes Of The Sixth Amendment's Jury Trial Guarantee. 6

B. The Sixth Amendment Violation In This Case Was Harmless Under *Neder v. United States*. 7

II. Nearly A Century Of Legal Reasoning Weighs Against Overruling *Neder v. United States*. 9

A. Jury Verdicts Obtained After Fundamentally Fair Adversarial Testing Should Not Be Reversed Unless An Error Contributed To The Result. 10

B. The Error In This Case Falls Far Outside The Class Of "Structural Errors." 13

1. Structural Errors So Distort the Framework Of Trial As To Render It An Unreliable Mechanism For Determining Guilt. 13

TABLE OF CONTENTS

PAGE

a. The Sixth Amendment Jury Trial Guarantee Was Not Grounded On A Belief That An Unbiased Judge Is Inherently Less Likely To Arrive At The Truth Than An Unbiased Jury 14

b. An Instructional Omission Or Misdescription Does Not Distort The Entire Framework Of The Trial. 16

2. An Instructional Omission or Misdescription Is Different From An Instruction That Permits The Jury To Make Factual Findings On Evidence Less Certain Than "Beyond A Reasonable Doubt." 18

a. *Neder,* Like This Case, Did Not Involve A Total Deprivation Of The Right To Jury Trial. 19

b. The Cost Of Applying *Sullivan* to An Instructional Omission Or Misdescription Is Too Great. 20

3. Nothing In *Apprendi* Or Its Progeny Undermines *Neder*. 20

III. Affirmance Imposes The Burden Of Retrying Cases In Which Instructional Error Would Have Been Harmless Under *Neder* And Permits States To Enlarge The Class Of Structural Errors. 23

A. The Impact Of Overruling *Neder* On State Criminal Dockets Will Be Substantial 24

TABLE OF CONTENTS

PAGE

1. Many States Expressly Apply *Neder* To *Neder* and *Apprendi* Errors 24
2. Overruling *Neder* Threatens Several State Rules That Parallel *Neder*. 25
3. If *Neder* Error Is Structural, States May Reverse For Unpreserved *Neder* Errors 25

B. Affirming The Washington Supreme Court Would Permit States To Redefine Structural Error. 28

CONCLUSION 30

TABLE OF AUTHORITIES

PAGE

CASES

Almanza v. State, 724 S.W.2d 805 (Tex. Cr. App. 1987) 25

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... passim

Arizona v. Fulminante, 499 U.S. 279 (1991) ..... passim

Bilzerian v. United States, 127 F.3d 237 (2d Cir. 1997) 15

Blakely v. Washington, 542 U.S. 296 (2004) 2, 4, 5, 6, 14

Brecht v. Abrahamson, 507 U.S. 619 (1993) 16

California v. Roy, 519 U.S. 2 (1996) 12

Carella v. California, 491 U.S. 263 (1989) 12

Cauthern v. State, 145 S.W.3d 571 (Tenn. Crim. App. 2004) 24

Chapman v. California, 386 U.S. 19 (1967) ..... passim

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 9, 11, 16

DeStefano v. Woods, 392 U.S. 631 (1968) 15

Duncan v. Louisiana, 391 U.S. 145 (1968) 14, 15, 20

Gideon v. Wainwright, 372 U.S. 335 (1963) 13

Griego v. People, 19 P.3d 1 (Colo. 2001) 2, 24, 28

Hayes v. Commonwealth, 2005 WL 2674967 (Ky. 2005) 29

Hughes v. State, 901 So.2d 837 (Fla. 2005) 7

Johnson v. United States, 520 U.S. 461 (1997) 13, 17, 27, 30

Kolberg v. State, 829 So.2d 29 (Miss. 2002) 25

Kotteakos v. United States, 328 U.S. 750 (1946) 10, 30

Martin v. State, 2005 WL 2811737 (Md. App. 2005) 27

TABLE OF AUTHORITIES

PAGE

McKnight v. State, 287 S.W.2d 150 (Tex. Cr. App. 1956) 25

Mitchell v. Esparza, 540 U.S. 12 (2003) 5, 19, 21

Neder v. United States, 527 U.S. 1 (1997) ..... passim

Payne v. Arkansas, 356 U.S. 560 (1958) 13, 17, 29

People v. Crimmins, 326 N.E.2d 787 (N.Y. 1975) 25

People v. Hinojos-Mendoza, 2005 WL 2561391 (Colo. App. 2005) 28

People v. Miller, 113 P.3d 743 (Colo. 2005) 28

People v. Prieto, 66 P.3d 1123 (Cal. 2003) 7, 24

People v. Rodriguez, 764 N.Y.S.2d 301 (A.D. 2005) 25

People v. Thurow, 786 N.E.2d 1019 (Ill. 2003) 24

Ring v. Arizona, 536 U.S. 584 (2002) 15, 21, 23

Rose v. Clark, 478 U.S. 570 (1986) ..... passim

Schriro v. Summerlin, 542 U.S. 348 (2004) 4, 15, 17

State v. Allen, 615 S.E.2d 256 (N.C. 2005) 7, 10, 28

State v. Aplaca, 25 P.3d 792 (Hawaii 2001) 24

State v. Brown, 58 P.3d 889 (Wash. 2002) 24

State v. Brown, 827 A.2d 346 (N.J. Super. 2003) 29

State v. Burdick, 782 A.2d 319 (Me. 2001) 24

State v. Esquivel-Hernandez, 975 P.2d 254 (Kan. 1999) 29

State v. Garrison, 40 S.W.3d 426 (Tenn. 2000) 19

State v. Henderson, 115 P.3d 601 (Ariz. 2005) 7, 24

State v. Hill, 749 N.E.2d 274 (Ohio 2001) 27

State v. Jackman, 104 P.3d 686 (Wash. App. 2005) 29

TABLE OF AUTHORITIES

PAGE

State v. Lovelace, 90 P.3d 298 (Idaho 2004) 24

State v. McDonald, 99 P.3d 667 (N.M. 2004).....24

State v. Mills, 109 P.3d 415 (Wash. 2005).....28

State v. Montgomery, 759 A.2d 995 (Conn. 2000) 8, 24

State v. Rodriguez, 575 So.2d 1262 (Fla. 1991) 29

State v. Sprattling, 55 P.3d 276 (Hawaii 2002).....25

State v. Swanigan, 106 P.3d 39 (Kan. 2005).....29

State v. Warren, 608 N.W.2d 618 (Neb. App. 2000).....24

State v. Yaw, 398 N.W.2d 803 (Ia. 1987).....28

Stone v. Powell, 428 U.S. 465 (1976) 17

Sullivan v. Louisiana, 508 U.S. 275 (1993) ..... passim

Tumey v. Ohio, 273 U.S. 510 (1927).....13

Tyler v. Cain, 533 U.S. 656 (2001) 15

United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005) ..... passim

United States v. Cotton, 535 U.S. 625 (2002).....5, 21, 22, 27

United States v. Dominguez-Benitez, 542 U.S. 74 (2004) 22, 26, 27

United States v. Gaudin, 515 U.S. 506 (1995).....12

United States v. Hasting, 461 U.S. 499 (1982)....9, 12, 17, 20

United States v. Lane, 474 U.S. 438 (1986).....10, 11, 13, 29

United States v. Olano, 507 U.S. 725 (1993).....22

United States v. Sanders, 247 F.3d 139 (4th Cir.), *cert. denied*, 534 U.S. 1032 (2001) 15

United States v. Swatzie, 228 F.3d 1278 (11th Cir. 2000), *cert. denied*, 533 U.S. 953 (2001) 7

TABLE OF AUTHORITIES

PAGE

STATUTES

28 U.S.C. § 2111 10

28 U.S.C. § 391 (1925-26 ed.) 10

RULES

Fed. R. Cr. P. 52(a) 10

INTERESTS OF *AMICI CURIAE*

Amici Curiae are States that will be substantially impacted by a system that requires automatic reversal of criminal convictions for constitutional errors or defects that have "little, if any, likelihood of having changed the result of the trial." *Chapman v. California*, 386 U.S. 18, 22 (1967).

The "harmless error" rule announced in *Chapman*, and applied in some form in all fifty States, *Chapman*, 386 U.S. at 22, discourages retrial of cases in which a constitutional error had no effect on the outcome. *Id.* Six years ago, the Court extended *Chapman* to instructional errors that *in theory* prevent the jury from determining an element of an offense, but which do not *actually* contribute to the verdict. *Neder v. United States*, 527 U.S. 1 (1999). In *Neder*, an instructional omission was harmless because the omitted element was uncontested and supported by overwhelming evidence.

A year after deciding *Neder*, the Court turned to sentencing practices. It concluded that for purposes of the Sixth Amendment's jury trial guarantee, any fact necessary to support a sentence above the maximum authorized based solely on the statutory elements of the crime ("sentence-enhancing facts") is the "functional equivalent" of an element of a greater crime. *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000). Therefore, any fact (other than a prior conviction) that is legally necessary to support a sentence exceeding the maximum authorized by the statutory elements established by a jury verdict must be submitted to the jury and determined beyond a reasonable doubt. *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 756 (2005).

In this case, the Washington Supreme Court held that a jury's failure to determine a sentence-enhancing fact — namely, whether the defendant was armed with a "firearm"

during an assault — could not be harmless, even though *the defense conceded at trial that the error had no effect on the outcome*. *State v. Recuenco*, 110 P.3d 188, 192 (Wash. 2005). If the Washington Supreme Court is correct that the jury's failure to determine a sentence-enhancing fact because it was not instructed to do so can never be harmless, then a jury's failure to determine an element because it was not instructed to do so cannot be harmless, either. In other words, upholding the Washington Supreme Court's decision would lead inexorably to the overruling of *Neder*.

Amici Curiae include States that follow *Neder* expressly or apply a state rule that parallels *Neder*. *See, e.g., Griego v. People*, 19 P.3d 1, 8 (Colo. 2001) (citing *Neder*); p. 24 and n.1, *infra* (listing decisions applying *Neder* to the absence of a jury finding on a sentence-enhancing fact); Appendix (listing decisions expressly applying *Neder* to the absence of a jury finding on an element). If this Court affirms the Washington Supreme Court, it would require automatic reversal and retrial in many cases in which the omitted element or fact was uncontested or supported by overwhelming evidence. These retrials will impose a substantial burden on the States.

SUMMARY OF ARGUMENT

I. Under the Sixth Amendment's jury trial guarantee, any fact (other than a prior conviction) that is legally necessary to support a sentence exceeding the maximum authorized by the statutory elements of the offense must be submitted to the jury and determined beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220, 25 S.Ct. 738, 756 (2005). These cases hold that sentence-enhancing facts are the "functional equivalent" of elements of the offense for purposes of the

Sixth Amendment jury trial guarantee. *Apprendi*, 530 U.S. at 494 n. 19.

Apprendi and its progeny have not held, however, that *Apprendi* errors always require reversal. The Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), all but forecloses that possibility. In *Neder*, the Court held that a jury's failure to determine an element of an offense because the element was omitted from or misdescribed in jury instructions does not automatically require reversal. Rather, such errors may be harmless under *Chapman v. California*, 387 U.S. 19 (1967). For example, such errors are harmless when the "missing" element is uncontroverted and supported by overwhelming evidence. *Neder*, 527 U.S. at 18-19. If sentence-enhancing facts are the "functional equivalent" of elements for purposes of the Sixth Amendment jury trial guarantee, and if the absence of a jury finding on an *element* is harmless when the element is uncontroverted and supported by overwhelming evidence, then the absence of a jury determination on a *sentence-enhancing fact* should be harmless under those same circumstances. Those circumstances exist here.

The Washington Supreme Court, however, concluded that when a jury instruction omits a sentence-enhancing fact, thereby precluding the jury from making a finding on the issue, the sentence must be vacated even if the jury would surely have found that fact had it been properly instructed. *State v. Recuenco*, 110 P.3d 188, 192 (Wash. 2005). If upheld, this conclusion would cast serious doubt on *Neder*.

II. This case does not warrant an historic break with *Neder*. For nearly a century, American courts have been committed to a common-sense focus on reversing only those errors that prejudice the defendant. *See, e.g.*, *Chapman*, 386 U.S. at 22. Although there are some rights so critical to a "fair and correct judgment" that any violation cannot be

tolerated, *Rose v. Clark*, 478 U.S. 570, 578 (1986), the Sixth Amendment's jury trial guarantee is not among them.

The Sixth Amendment's jury trial right reserved judicial power in the people. *Blakely*, 542 U.S. at 306. That reservation, however, was not grounded on a belief that judges are inherently less accurate factfinders than ordinary citizens. In fact, scholars still debate whether unbiased juries or unbiased judges are more likely to arrive at the truth. *See Schriro v. Summerlin*, 542 U.S. 348, 355-56 (2004). Therefore, it is "implausible that judicial factfinding so seriously diminishe[s] accuracy as to produce and impermissibly large risk of injustice." *Id.* at 355-56 (internal quotation marks and citations omitted).

Errors that require automatic reversal without a review for their actual impact on the verdict — *i.e.*, "structural errors" — are those errors that so undermine the fundamental fairness of a trial as to render it an "unreliable vehicle for determining guilt. *Rose*, 478 U.S. at 577-78. They are, however, the "exception, not the rule," *id.* at 578, and this Court has suggested in a different context that it is "unlikely that any more remain to be discovered." *Schriro*, 542 U.S. at 352 (citation omitted).

Because a Sixth Amendment violation stemming from the absence or misdescription of an element from jury instructions does not undermine the reliability of the result when the jury would surely have found the element given proper instructions, such a violation is not one of the "very limited" class of structural errors. *Arizona v. Fulminante*, 499 U.S. 279 (1991).

Such violations are "markedly different" from the case in which the jury receives a defective reasonable doubt instruction that permits conviction upon proof less certain than "beyond a reasonable doubt." *Fulminante*, 499 U.S. at 309; see *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Indeed,

Neder distinguished *Sullivan*, and the distinction remains valid. *Neder*, 527 U.S. at 10-12.

Further, the *Apprendi* line of cases does not imply that the absence of a jury determination on a fact necessary to sustain a particular punishment — be it a sentence-enhancing fact or an element — necessarily "def[ies] analysis by harmless error standards." *Fulminante*, 499 U.S. at 309. On the contrary, the Court has held that *Apprendi* errors may be reviewed for plain and harmless error, both of which require a showing of prejudicial effect. *United States v. Cotton*, 535 U.S. 625, 631 (2002); *Mitchell v. Esparza*, 540 U.S. 12 (2003).

III. Many states review jury instructions that omit or misdescribe an element for harmlessness under *Neder*. If the Washington Supreme Court is affirmed, those states will be forced to conclude that an omission of an element from jury instructions requires automatic reversal, even if the element is uncontroverted, supported by overwhelming evidence, or otherwise harmless beyond a reasonable doubt.

ARGUMENT

I. The Washington Supreme Court's Decision Casts Serious Doubt On *Neder v. United States*.

At first glance, the issue in this case seems limited to the propriety of sentences above the "prescribed statutory maximum" that are based on judicial factfinding. See *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (the "prescribed statutory maximum" sentence for Sixth Amendment purposes "is not the maximum a judge may impose after finding additional facts, but the maximum he may impose without any additional findings"). However, *Blakely* and the Court's other recent Sixth Amendment cases equate sentence-enhancing facts with elements of an offense

for purposes of the right to jury trial. Therefore, if the absence of a jury finding of a sentence-enhancing fact can never be harmless error, the absence of a jury finding on an element cannot be harmless, either — contrary to the holding in *Neder v. United States*, 527 U.S. 1 (1999).

A. Sentence-Enhancing Facts Are Functionally Equivalent To Elements For Purposes Of The Sixth Amendment's Jury Trial Guarantee.

"Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum punishment authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States v. Booker*, 542 U.S. 220, 125 S.Ct. 738, 756 (2005); see also *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

At the center of these "*Apprendi* cases" is a "relatively new trend" in sentencing, *Booker*, 542 U.S. 220, 125 S.Ct. at 751, in which judges find facts about the offense or offender that increase or enhance the penalty beyond the maximum set for the "generic offense" — *i.e.*, the maximum available based solely on the elements exactly as described in the relevant statute. *Id.* at 751-52. *Apprendi* and its progeny reason that for purposes of the Sixth Amendment's jury trial guarantee, a sentence-enhancing fact is the "functional equivalent" of elements of an offense greater than the one charged. *Apprendi*, 530 U.S. at 494 n.19. Therefore, failure to submit such facts to the jury violates an "ancient guarantee" that the "truth of every accusation" necessary to a particular punishment "should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours ...." *Id.* at 477 (quotation omitted); see also *id.* at 478 (the Framers of the Constitution drew no distinction between an element of an offense and fact that

increases its maximum punishment); *Booker*, 542 U.S. 220, 125 S.Ct. at 751-52.

B. The Sixth Amendment Violation In This Case Was Harmless Under *Neder v. United States*.

The *Apprendi* line of cases does not, however, always require vacation of a sentence that rests upon a fact determined in violation of the Sixth Amendment. In fact, the Court has held that a jury's failure to determine *an element of the offense* due to an instructional omission or misdescription can be harmless when it does not contribute to the verdict. *Neder v. United States*, 527 U.S. 1, 8, 15, 19 (1999). That standard is met when the "missing" element is uncontested and supported by overwhelming evidence. *Id.* at 17.

If a jury's failure to determine *an element* can be harmless under *Neder*, then a jury's failure to determine *a sentence-enhancing fact* can be harmless, too. They are, after all, functional equivalents. *See, e.g., State v. Henderson*, 115 P.3d 601, 607 (Ariz. 2005) (*Apprendi* error is analogous to *Neder* error); *State v. Allen*, 615 S.E.2d 256, 275-80 n.10 (N.C. 2005) (Martin, J., concurring in part and dissenting in part) (same); *Hughes v. State*, 901 So.2d 837, 844 (Fla. 2005) (same); *People v. Prieto*, 66 P.3d 1123, 1143 (Cal. 2003) (same); *United States v. Swatzie*, 228 F.3d 1278, 1283 (11th Cir. 2000), *cert. denied*, 533 U.S. 953 (2001) (same).

In this case, the jury did not determine a sentence-enhancing fact — namely, the specific type of deadly weapon with which the defendant was armed during the assault. JA at 9, 12, 13. It is obvious, however, that the absence of a jury finding on that narrow question is harmless under *Neder*. The relevant count alleged that the defendant assaulted the victim with a deadly weapon, "to wit: a handgun." JA at 2. Moreover, the jury found that the

defendant was armed with a deadly weapon during the assault, JA at 6, 9, 12, and there was no evidence that the defendant used any other kind of weapon during the assault. JA at 34-35; Pet. at 2; Reply at 1-2. In fact, the defense did not contest that the defendant was armed with a gun during the assault. At the instruction conference, the trial court noted that it was "undisputed" that the deadly weapon involved was a gun, and defense counsel did not disagree. JA at 15-16, 24. Defense counsel even requested an instruction containing a specific definition of "firearm" and argued that "aiming a firearm" should be submitted to the jury as a lesser-included offense. JA at 16-17, 18, 19-23, 25. In addition, defense counsel repeatedly argued in closing that the gun the defendant was holding immediately after the assault was the deadly weapon referred to in the charge. Pet. at 4. The defense also admitted in a posttrial hearing that defendant's use of a firearm had been "pleaded and argued ... and evidently, perhaps obviously, proven to the jury." JA at 36. Just as in *Neder*, the evidence that the defendant was armed with a firearm was uncontested and overwhelming. The jury would not have found otherwise had it been instructed to determine whether the defendant was armed with a "firearm" instead of a "deadly weapon." See *State v. Recuenco*, 2003 WL 21738927 (Wash. App. 2003) (unpublished), *rev'd*, 100 P.3d 188 (Wash. 2005); see also *State v. Montgomery*, 759 A.2d 995, 1022 and n.47 (Conn. 2000) (jury's conviction on a count alleging that defendant killed the victim with a firearm arguably included a finding on sentence-enhancing fact that defendant used a firearm) (dictum).

In fact, the error here was less serious than the one in *Neder*. In *Neder*, the instructions completely omitted the factual issue. Here, by contrast, the instructions did *not* completely omit the sentence-enhancing fact. Instructions 8, 9 and 18 required the jury to determine whether the defendant assaulted the victim with a deadly weapon. They

also informed the jury that "deadly weapons" included firearms, but did not mention any *other* kind of deadly weapon. JA at 7-8. Therefore, the jury was asked to find whether the defendant was armed with a "deadly weapon" during the assault, but "firearm" was the only deadly weapon of which it was aware. Unlike *Neder*, then, this case does not involve the complete removal of an essential fact from the jury. The evidence supported only the existence of a firearm; the error here was that the special verdict form only permitted the jury to *communicate* that the defendant was armed with a "deadly weapon," rather than the specific deadly weapon established by the evidence. Although the jury finding on the sentence-enhancing fact here was *imprecise*, it was not *absent*. This is hardly the case in which to overrule *Neder* and reverse course on the road of common-sense appellate review.

If the Washington Supreme Court is correct, then the omission of a sentence-enhancing fact from jury instructions cannot be harmless. Because sentence-enhancing facts and elements are "functional equivalents" for purposes of the Sixth Amendment jury trial guarantee, upholding the Washington Supreme Court would be the functional equivalent of overruling *Neder*.

II. Nearly A Century Of Legal Reasoning Weighs Against Overruling *Neder v. United States*.

"Given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and ... the Constitution does not guarantee such a trial." *United States v. Hasting*, 461 U.S. 499, 598-99 (1982); see also *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("the Constitution entitles a criminal defendant to a fair trial, not a perfect one"). When a jury fails to determine an essential fact that is uncontested and

supported by overwhelming evidence (because it was not asked to do so), a second trial may be closer to perfect, but does not measurably increase the fairness or reliability of the verdict over the first trial. Yet the Washington Supreme Court still demands that second trial.

A. Jury Verdicts Obtained After Fundamentally Fair Adversarial Testing Should Not Be Reversed Unless An Error Contributed To The Result.

Until the early twentieth century, American courts routinely reversed criminal convictions based on "trivial technical errors." *See generally*, *State v. Allen*, 615 S.E.2d 256, 275 (N.C. 2005) (Martin, J., concurring in part and dissenting in part) (citation omitted). Beginning in 1919, however, a federal statute required courts to review convictions "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties." *See United States v. Lane*, 474 U.S. 438, 448 (1986) (quoting 28 U.S.C. § 391 (1925-26 ed.)); *see also id.* at 454 (Brennan, J., concurring in part and dissenting in part). This statute evolved into both the federal harmless error statute, 28 U.S.C. § 2111, and the federal harmless error rule, Fed. R. Cr. P. 52(a). *Kotteakos v. United States*, 328 U.S. 750, 757 n.9 (1946); *Lane*, 474 U.S. at 448; see also *id.* at 454 (Brennan, J., concurring in part and dissenting in part).

Nearly sixty years ago, this Court interpreted the harmless error statute to bar reversals for errors that did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776. The error in that case, however, was not a constitutional one, *Lane*, 474 U.S. at 446, and the Court left open the door for argument that the statute did not apply to constitutional errors. *Kotteakos*, 328 U.S. at 764-65.

That door closed in 1967, when the Court held that there were at least some constitutional errors that are "so unimportant and insignificant" in the context of the entire trial that they could be deemed harmless. *Chapman*, 367 U.S. at 22. Noting that all fifty states had enacted "harmless error" rules or statutes, *id.* at 20, the Court observed that such rules served the "very useful" purpose of preserving convictions involving "small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Id.* at 22. The Court went on to hold that: (1) it is the prosecution's burden to establish the harmlessness of a constitutional error "beyond a reasonable doubt"; and (2) such an error is harmless when it "did not contribute to the verdict." *Id.*

Under *Chapman*, whether an error "affects substantial rights" and therefore requires reversal is not determined by a "process of classification whereby some rights are deemed substantial and ... automatically reversible." *Lane*, 575 U.S. at 455-56 (Brennan, J., concurring in part and dissenting in part). Rather, an error "affects substantial rights" only when it "affect[s] the fairness of the trial ... by calling into question the reliability of the result." *Id.* Since *Chapman*, the Court has repeatedly stressed that the "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," that constitutional errors can be harmless "in terms of their effect on the factfinding process at trial," *Van Arsdall*, 475 U.S. at 681, and that the "thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments." *Rose v. Clark*, 478 U.S. 570, 578 (1986). Therefore, appellate courts should focus on "the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991) (quoting *Van Arsdall*, 475 U.S. at 681). Where the record establishes guilt beyond a reasonable doubt, "the interest in fairness has been

satisfied and the judgment should be affirmed." *Rose*, 478 U.S. at 578. In this way, appellate courts "conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error." *Hasting*, 461 U.S. at 508-09 (citation omitted).

In accordance with these principles, the Court has applied harmless error to a "wide range of errors," *Fulminante*, 499 U.S. at 306 (collecting cases), including instructions that directed the jury to presume an element based on the existence of predicate facts. *See, e.g., California v. Roy*, 519 U.S. 2 (1996); *Carella v. California*, 491 U.S. 263 (1989) (instruction that intent to steal must be inferred from failure to return rental property could be harmless); *Rose*, 478 U.S. at 575, 579-80, 581-82 (1986) (although jury was erroneously instructed to presume malice from the fact of the killing, the evidence of malice was "overpowering").

In 1999, the Court extended the reasoning of these cases to jury instructions that completely omitted an element of the offense. *Neder v. United States*, 527 U.S. 1 (1999). There, the trial court, rather than the jury, determined that misstatements on the defendant's tax returns were "material." This was error under *United States v. Gaudin*, 515 U.S. 506 (1995). But because there was overwhelming evidence that the misstatements were material, and the defendant was unable to contest their materiality, this Court concluded that the jury would surely have found the misstatements to be material had it been asked to consider the issue. *Id.* at 8-15. Under these circumstances, reversal was pointless because the materiality element would be uncontested in a retrial. *Id.* at 15.

B. The Error In This Case Falls Far Outside The Class Of "Structural Errors."

There are some rights whose violation cannot be considered harmless under any circumstances. *Lane*, 474 U.S. at 461 n.2 (Brennan, J., concurring in part and dissenting in part). However, those rights are "so basic to a fair trial," *id.*, that a violation warps the "framework within which the trial proceeds," *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), and "necessarily render[s] the trial fundamentally unfair" such that it "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577 (1986). Although the Sixth Amendment's jury trial right serves important values, the Court has never held that its violation always renders the trial an unreliable mechanism for establishing guilt.

1. Structural Errors So Distort the Framework Of Trial As To Render It An Unreliable Mechanism For Determining Guilt.

Although *Chapman* held that constitutional error could be harmless, it also identified some rules "so basic to a fair trial that their infraction can never be treated as harmless error." *Lane*, 474 U.S. at 461 n.2 (Brennan, J., concurring in part and dissenting in part) (until *Chapman*, harmless error "was considered inapplicable" to constitutional errors). *Chapman* identified three such errors. *Id.*, 386 U.S. at 23 n.8 (citing *Payne v. Arkansas*, 356 U.S. 560 (1958) (admission of an involuntary confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of the right to counsel); and *Tumey v. Ohio*, 273 U.S. 510 (1927) (trial before a partial judge)). Two of these three errors, plus four more announced in the thirty-eight years since *Chapman*, constitute a class of "structural errors" that "defy analysis by

'harmless error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (erroneous admission of involuntary confession is not structural error); *Johnson v. United States*, 520 U.S. 461, 468 (1997) (four errors have been added to the structural errors identified in *Chapman*: (1) exclusion of members of the defendant's race from the grand jury; (2) the right to self-representation at trial; (3) denial of the right to a public trial; and (4) a reasonable doubt instruction that misdescribes the burden of proof) (citations omitted). Sixth Amendment violations of the type in *Neder* and this case are not in this "very limited" class of errors. *Johnson*, 520 U.S. at 468.

a. The Sixth Amendment Jury Trial Guarantee Was Not Grounded On A Belief That An Unbiased Judge Is Inherently Less Likely To Arrive At The Truth Than An Unbiased Jury.

Apprendi and its progeny view the Sixth Amendment's jury trial right as a reservation of power in the people. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely*, 542 U.S. at 306. Also, the right to jury trial "guard[s] against a spirit of oppression and tyranny on the part of rulers" and is "the great bulwark of our civil and political liberties." *Apprendi*, 530 U.S. at 477; see also *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (right to jury trial is an "inestimable safeguard against the corrupt or overzealous prosecutor and ... the compliant, biased or eccentric judge"); *id.* at 155-56 and n.23. *Apprendi* and its progeny then reason that the jury trial right fully protects the accused against these evils only when it encompasses the prerogative of submitting to a jury, rather than a judge or judges, the determination of each fact necessary to the imposition of a particular punishment. *Apprendi*, 530 U.S. at 477; see also *Booker*, 542 U.S. 220,

125 S.Ct. at 756; *Blakely*, 542 U.S. at 306-07. That entitlement "ensur[es] that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Blakely*, 542 U.S. at 306.

Although the right to jury trial is a critical protection against "arbitrariness and repression" by the government's criminal justice machine, *DeStefano v. Woods*, 392 U.S. 631, 633 (1968), the Court has not viewed the right as a protection against an inherent tendency of fair and neutral judges to make more mistakes in ascertaining the "truth of every accusation" against the defendant than unbiased lay citizens. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 607 (2002) ("The Sixth Amendment jury trial right ... does not turn on the relative rationality, fairness, or efficiency of potential factfinders"). For every argument that juries return more reliable verdicts than judges, there is an opposing argument. *Schriro*, 542 U.S. at 356; *Duncan*, 391 U.S. at 256-57. That long and evenly-matched debate is one reason why it is "implausible that judicial factfinding so *seriously* diminishe[s] accuracy as to produce an impermissible large risk of injustice." *Schriro*, 542 U.S. at 356 (emphasis in original); see also *United States v. Sanders*, 247 F.3d 139, 149 (4th Cir.) (shifting determination of an element (or sentence-enhancing fact) from judge to jury does not result in more accurate determinations), *cert. denied*, 534 U.S. 1032 (2001); *Bilzerian v. United States*, 127 F.3d 237, 241 (2d Cir. 1997). In fact, when the Court extended the jury trial right to state trials, it recognized that judicial factfinding is not inherently less fair to the defendant than a jury trial. *Duncan*, 391 U.S. at 158; see also *DeStefano*, 392 U.S. at 633-34. Just five months after *Duncan*, the Court said that the values underlying the jury trial right "would not measurably be served" by applying *Duncan* retroactively to convictions that were final when it was announced. *DeStefano*, 392 U.S. at 634.

It is true that both *DeStefano* and *Schriro* were retroactivity cases, and that the modern test for retroactive application of new constitutional rules of procedure is more stringent than the test for whether an error is "structural." *Tyler v. Cain*, 533 U.S. 656, 666 and n.7 (2001). They are important here, though, because they acknowledge that nobody knows whether juries are more accurate finders of facts. We simply cannot say that an unbiased judge's determination of a fact necessary to the punishment imposed — be it an element or sentence-enhancing fact — makes the determination inherently less reliable than if a jury had determined it. The Sixth Amendment was intended as a protection against abuse and arbitrariness, not inaccuracy.

b. An Instructional Omission Or Misdescription Does Not Distort The Entire Framework Of The Trial.

The common thread in the Court's "structural error" cases is that the violations were "structural defects in the constitution of the trial mechanism" that "infect" the "entire conduct of the trial from beginning to end." *Fulminante*, 499 U.S. at 310; *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). They are violations of such basic protections, and are so serious, that they distort "the framework within which the trial proceeds," *Fulminante*, 499 U.S. at 310, and "necessarily render the trial fundamentally unfair" such that it "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S. at 577.

Structural errors differ markedly from "trial errors" — that is, errors arising "during the trial process itself." *Fulminante*, 499 U.S. at 307. In contrast to structural errors, trial errors alter the way in which the case is presented to the jury, and "may therefore be quantitatively assessed in the

context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 307-08; see also *Van Arsdall*, 475 U.S. at 677-78, 684 (denial of cross-examination is not reversible *per se*; a reviewing court "should be able to decide whether the not-fully-impeached evidence might have affected the reliability of the factfinding process...").

Structural errors "are the exception, not the rule." *Hasting*, 461 U.S. at 509. In fact, this Court has identified only six, *Johnson*, 520 U.S. at 468 (citations omitted), and has said that "if the defendant has counsel and was tried by an impartial adjudicator, there is strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose*, 478 U.S. at 579. The class of rules that are so fundamental to a fair trial that violations thereof "seriously diminish[]" the likelihood of an accurate conviction is "extremely narrow," and it is "unlikely that any [such rule] has yet to emerge." *Schriro*, 542 U.S. at 352 (citations omitted). And, although the Court has added new members to that class on occasion, it has arguably expelled others. See *Fulminante*, 499 U.S. at 308-09 (rejecting the argument that under *Payne v. Arkansas*, 356 U.S. 560 (1958), admission of an involuntary confession cannot be reviewed for its impact on the verdict).

Fourth Amendment violations are not structural. *See, e.g., Stone v. Powell*, 428 U.S. 465, 488 (1976) ("the policies behind the exclusionary rule are not absolute, [but] must be evaluated in light of competing policies"; federal habeas relief for alleged Fourth Amendment violations is unavailable if the prisoner has an opportunity for full and fair litigation thereof in state court). Neither are Fifth Amendment violations. *See, e.g., Chapman*; *Fulminante*, 499 U.S. at 310-11. *Neder* firmly established that instructional omissions or misdescriptions do not rise to the level of structural error. 527 U.S. at 8-15, 18.

2. An Instructional Omission or Misdescription Is Different From An Instruction That Permits The Jury To Make Factual Findings On Evidence Less Certain Than "Beyond A Reasonable Doubt."

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the reasonable doubt instruction was unconstitutionally defective because it permitted conviction upon evidence less certain than "beyond a reasonable doubt." *Id.* at 277, 280. The Court held that the error could not be reviewed for harmlessness because such review assumes that the jury found guilt "beyond a reasonable doubt," and then asks whether that verdict would have been the same without the error. *Id.* at 279. In *Sullivan*, the faulty reasonable doubt instruction prevented the jury from returning a "verdict" within the meaning of the Sixth Amendment. *Id.* at 280.

In *Neder*, the dissent argued that there is no constitutional difference between the absence of a jury finding on *all* elements, as in *Sullivan*, and the absence of a jury determination on *one* element, as in *Neder*. *Neder*, 527 U.S. at 33 (Scalia, J., dissenting). Moreover, to say that the omission or misdescription of a fact issue in jury instructions is harmless requires appellate judges, rather than the jury, to conclude that the missing element was proved beyond a reasonable doubt — the very procedure against which the Sixth Amendment was intended to protect. *Id.* at 31-40 (Scalia, J., dissenting).

In *Neder*, a majority of this Court acknowledged that this argument was not "illogical," 527 U.S. at 15, but concluded that it was unpersuasive for two reasons that also apply here.

a. *Neder*, Like This Case, Did Not Involve A Total Deprivation Of The Right To A Jury Trial.

First, in *Sullivan*, the error "vitiated *all* the jury's findings." 508 U.S. at 281 (emphasis in original). Put differently, the defective reasonable doubt instruction in *Sullivan* prevented the factfinding body *from acting as a jury*, because it had been told that it could convict while still maintaining a reasonable doubt. The factfinding body could have been called a review board or a star chamber, but it was not a Sixth Amendment *jury*. Thus, the defendant suffered a total deprivation of the jury trial right. The error could be harmless only if *appellate judges* functioned as the jury. *Id.* at 279.

In *Neder* and in this case, by contrast, a properly selected factfinding body determined facts beyond a reasonable doubt, thereby functioning as a Sixth Amendment jury. Although an instructional error prevented the jury from returning a precise finding on a factual issue, the defendant was not completely deprived of the protections that the Sixth Amendment provides. See *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (*per curiam*) (*Neder* "explicitly distinguished" *Sullivan* because the error in that case 'vitiated all the jury's findings,' whereas the trial court's failure to instruct the jury on one element did not") (quoting *Neder*, 527 U.S. at 11); see also *State v. Garrison*, 40 S.W.3d 426, 434 (Tenn. 2000) (omission of element from jury instructions was not structural error because "the integrity of the jury as a fact-finding body was not disturbed"). Moreover, the absence of a finding on an element does not taint the findings that the jury did make, or relegate the factfinding body to less-than-Sixth-Amendment status. For these reasons, *Sullivan* does not prevent a reviewing court from asking whether the jury's conclusions would have been different absent the error. *Neder*, 527 U.S. at 10-15.

b. The Cost Of Applying *Sullivan* to An Instructional Omission Or Misdescription Is Too Great.

The *Neder* majority also rested upon the maxim that "the life of the law has not been logic, but experience." *Neder*, 527 U.S. at 15 (quoting O. Holmes, The Common Law 1 (1881)). Choosing to "stand back" for a broad view of what extending *Sullivan* to the facts before it would accomplish, *Neder*, 527 U.S. at 15, the majority concluded that the cost of extending *Sullivan* to cases in which the missing element had been uncontested, was supported by overwhelming evidence, and would not be contested on retrial, simply outweighed the benefit of retrying the case. *Neder*, 527 U.S. at 15. There was no point, it said, in retrying a case involving *Neder* error when the retrial would not focus on the missing element, but on the elements that were contested before, and upon which the jury was properly instructed the first time around. *Id.* The same reasoning governs here. See Argument III, *infra*.

3. Nothing In *Apprendi* Or Its Progeny Undermines *Neder*.

Apprendi and its progeny recognized that the primary purpose of the jury trial right was to thwart arbitrariness and oppression. See pp. 14-16, *supra*. However, the *Apprendi* cases do not say that juries return more reliable verdicts than judges. *See, e.g., Duncan, supra.* If the fundamental purpose of a criminal trial is to decide fairly the factual question of the defendant's guilt or innocence, *Rose*, 478 U.S. at 577, and a jury's failure to determine a single undisputed element (or sentence-enhancing fact) does not seriously undermine either the fairness or the accuracy of that determination, *Neder*, *supra*, then justice has been done. An appellate court may not require a do-over just to take another shot at the unattainable "perfect" trial. *See, e.g., United States v. Hasting*, 461 U.S. 499, 598-99 (1983)

("there can be no such thing as an error-free, perfect trial, and ... the Constitution does not guarantee such a trial"); *Fulminante*, 499 U.S. at 308 ("immaterial error" is "virtually inevitable" in every criminal trial).

It is no surprise, then, that the Court has already rejected the argument that *Apprendi* error is structural. See *United States v. Cotton*, 535 U.S. 625 (2002); *United States v. Booker*, 542 U.S. 220, 125 S.Ct. 738 (2005); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (*per curiam*); *Ring v. Arizona*, 536 U.S. 584 (2002).

In *Cotton*, the indictment did not charge, and the jury did not determine, a sentence-enhancing fact. 535 U.S. at 632. But the Court concluded unanimously that the error did not require reversal, because the enhancing fact was supported by "overwhelming and uncontroverted" evidence. *Id.* at 634. The Court concluded that the greater threat to the "fairness, integrity and public reputation of judicial proceedings" was vacating the enhanced sentence, not the original Sixth Amendment error. *Id.* As with *Neder*, the cost of reversing every *Apprendi* error does not outweigh any small gain in fairness.

Mitchell involved Ohio law, under which a defendant must be a "principal offender" in a murder during an aggravated robbery to be eligible for the death penalty. 540 U.S. at 14 n.1 (citation omitted). The murder charge did not allege, and the jury did not find, that the defendant was a "principal offender" in the robbery and murder of a store clerk. *Id.* at 14. An Ohio appellate court concluded, however, that strict compliance with the statute was unnecessary when the defendant is the only person charged with the robbery/murder. *Id.* In habeas proceedings, lower federal courts vacated the death sentence, holding that failure to comply with the statute was the "functional equivalent" of the error in *Sullivan*. *Mitchell*, 540 U.S. at 16. This Court reversed, holding that the absence of the "principal offender"

allegation (and jury finding) was analogous to *Neder* error. Therefore, the Ohio State court reasonably concluded that *Apprendi* errors are not "structural" but rather subject to a harmless error analysis. *Id.* at 18-19.

In *Booker*, this Court invalidated the United States Sentencing Guidelines to the extent that they mandated shifted sentence ranges based on judicially-determined facts. However, the Court predicted that its decision would not require many new sentencing hearings because appellate courts must still apply "ordinary prudential doctrines," including "whether the issue was raised below" and whether it "fails the 'plain error' test." 542 U.S. 220, 124 S.Ct. at 769. Put differently, *Apprendi* errors in federal sentences will be reviewed for harmlessness if preserved, *Neder*, 527 U.S. at 7, or for plain error if unpreserved. *Cotton*, 535 U.S. at 631; *United States v. Olano*, 507 U.S. 725, 731-34 (1993). Both standards involve a review of the record for any prejudicial effect on the result. *United States v. Dominguez-Benitez*, 524 U.S. 74, 81 (2004) (except for structural errors, relief for error "is tied in some way" to prejudicial effect on the outcome of a proceeding). Although the *Booker* Court was divided over several issues, it was not divided on this point.

Finally, in *Ring*, the Court applied *Apprendi* to invalidate a death sentence. The Court declined to reach the State's harmless error argument, but only because harmlessness determinations are normally left for lower courts. *Ring*, 536 U.S. at 609 n.7. The Court's remand for proceedings "consistent with" its opinion signaled that *Apprendi* errors are not structural.

III. Affirmance Imposes The Burden Of Retrying Cases In Which Instructional Error Would Have Been Harmless Under *Neder* And Permits States To Enlarge The Class Of Structural Errors.

If the Washington Supreme Court is upheld, *Apprendi* errors effectively become structural errors. This would be an abrupt about-face for eight States that expressly apply *Neder* to hold that a jury's failure to determine a sentence-enhancing fact can be harmless. In addition, many States expressly apply *Neder* to uphold convictions despite omissions or misdescriptions of elements. Affirming the decision below threatens not only the "settled expectations" of these States, *Ring*, 536 U.S. at 613 (Kennedy, J., concurring), but also a number of other State rules similar to, but developed independently from, *Neder*. The dockets of State courts will balloon with retrials whose result is either practically predetermined (if the same witnesses and evidence are introduced), *Neder*, 527 U.S. at 15, or acquittal (if witnesses have become unavailable or evidence is lost).

There is also the potential that states will interpret an affirmance here as redefining structural error. If an instructional omission or misdescription is structural error even though there is no reasonable doubt that a properly instructed jury would have found the missing fact, then structural error is no longer limited to error warranting a presumption that the result is unreliable. Rather, States may hold that structural errors include violations of rights that do not serve to ensure an accurate determination of the truth.

A. The Impact Of Overruling *Neder* On State Criminal Dockets Will Be Substantial.

1. Many States Expressly Apply *Neder* To *Neder* and *Apprendi* Errors.

At least eight States have expressly applied *Neder* to *Apprendi* errors. *See, e.g., State v. Henderson*, 115 P.3d 601, 607 (Ariz. 2005); *People v. Thurow*, 786 N.E.2d 1019, 1026 (Ill. 2003); *State v. McDonald*, 99 P.3d 667, 669-70 (N.M. 2004).[1] A turn-about in most of these States will affect many individual sentences. California, for example, has applied *Neder* to uphold twenty-six sentences resting on facts determined in violation of the Sixth Amendment. *See, e.g., People v. Prieto*, 66 P.3d 1123, 1143 (Cal. 2003).

The burden of resentencing every defendant whose punishment rests on an *Apprendi* error, however, pales in comparison to the impact of overruling *Neder*.

Twenty States, including Washington and Colorado, have expressly applied *Neder* in concluding that instructional omissions or misdescriptions can be harmless. *See, e.g., State v. Brown*, 58 P.3d 889, 895 (Wash. 2002); *Griego v. People*, 19 P.3d 1, 8 (Colo. 2001). See Appendix. Four others — Arizona, Illinois, Maine and New Mexico — have applied *Neder* to sentence-enhancing facts. *Thurow, supra*; *Henderson, supra*; *McDonald, supra*; *State v. Burdick*, 782 A.2d 319, 327-29 (Me. 2001). At least two other States have suggested that *Neder* applies to instructional omissions or misdescriptions. *State v. Warren*, 608 N.W.2d 618, 622-23 (Neb. App. 2000); *State v. Sprattling*, 55 P.3d 276, 284-85 (Hawaii 2002). It is fair to say, then, that at least twenty-six

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[1] See also *State v. Montgomery*, 759 A.2d 995, 1022 (Conn. 2000); *State v. Lovelace*, 90 P.3d 298, 304 (Idaho 2004); *Cauthern v. State*, 145 S.W.3d 571, 623-24 (Tenn. Crim. App. 2004); *State v. Aplaca*, 25 P.3d 792, 799-802 (Hawaii 2001).

states apply *Neder* to instructional omissions or misdescriptions. Some of the States applying *Neder* have overruled state cases in doing so. See Appendix.

Overruling *Neder* will substantially lengthen the criminal dockets in many of these States. In California, courts have upheld sixty-three convictions despite *Neder* error. Washington courts have applied *Neder* forty-seven times to uphold convictions or enhanced sentences.

2. Overruling *Neder* Threatens Several State Rules That Parallel *Neder*.

Several States hold that failure to instruct on an element may be harmless under *Chapman* without relying on *Neder*. *See, e.g., People v. Crimmins*, 326 N.E.2d 787, 791 (N.Y. 1975) (adopting *Chapman*); *People v. Rodriguez*, 764 N.Y.S.2d 301, 302-03 (A.D. 2005) (failure to define "sexual contact" was harmless under *Crimmins*). New York appellate courts have upheld convictions in ten cases despite *Neder* error. Texas reviews instructional omissions and misdescriptions for "egregious error" if unpreserved, or "some error" if preserved. See *Almanza v. State*, 724 S.W.2d 805 (Tex. Cr. App. 1987). It has upheld thirty-one convictions or sentences since *Almanza*, and several more under pre-*Almanza* standards. *See, e.g., McKnight v. State*, 287 S.W.2d 150 (Tex. Cr. App. 1956). The impact of holding that instructional omissions or misdescriptions are structural errors extends well beyond the States that expressly apply *Neder*.

3. If *Neder* Error Is Structural, States May Reverse For Unpreserved *Neder* Errors.

The *Neder* majority noted that its ruling would apply to "misdescribed" elements as well as "clear cut" omissions. 527 U.S. at 14. A *per se* reversal rule, the Court observed, would require reviewing courts to determine "just how

serious" a misdescription had to be before it constituted structural error. *Id.* That would be difficult enough with the "ample volume" of federal crimes, but would be "measurably compounded" by habeas petitions for relief from state convictions. *Id.*; see also *id.* at 39 (Scalia, J., dissenting). Therefore, the Court wrote, "[W]e are entitled to stand back and see what would be accomplished" by extending *Sullivan* to instructional omissions and misdescriptions. *Id.* at 15.

In answering this concern, the *Neder* dissent argued that instructional omissions or misdescriptions required automatic reversal "only when [a] specific objection has been made and rejected." *Neder*, 527 U.S. at 39 (Scalia, J., dissenting). Otherwise, such errors are subject to plain error review, which is similar to ordinary harmless error review. *Neder*, 527 U.S. at 34-36, 39 (Scalia, J., dissenting); see also *United States v. Dominguez-Benitez*, 542 U.S. 74, 81 n.7 (2004). Therefore, applying *Sullivan* to such defective instructions would not require a significant number of retrials. *Neder*, 527 U.S. at 39 (Scalia, J., dissenting).

The *Neder* dissent might be correct insofar as direct appeals from federal convictions are concerned. The situation in State courts, however, is not as clear-cut. In fact, if the Washington Supreme Court is affirmed, States may conclude that *Neder* errors require reversal *regardless of whether they are preserved.*

On one hand, this Court has said that structural error requires reversal without a review for its *actual* effect on the outcome, because such effects are "necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 281. Also, structural errors are so "intrinsically harmful" that searching for actual impact is unnecessary. *Neder*, 527 U.S. at 7; see also *id.* at 8-9; *Fulminante*, 499 U.S. at 309-10. Moreover, the Court does not determine whether an error is structural on a case-by-case basis; "a constitutional error is

either structural or it is not." *Neder*, 527 U.S. at 14. In fact, Justice Stevens has argued that if an error always renders a trial fundamentally unfair, it warrants retrial even if unpreserved. *Neder*, 527 U.S. at 28 (Stevens, J., concurring in part and concurring in the judgment).

On the other hand, the Court has declined to hold that an instructional omission is structural, partly because the error was *unpreserved*. See *United States v. Cotton*, 535 U.S. 625 (2002); *Johnson v. United States*, 520 U.S. 461 (1997). In both cases, the Court rejected the claim that an instructional omission was structural error. *Cotton*, 535 U.S. at 632, *Johnson*, 520 U.S. at 463. The seriousness of an alleged error, it held, "does not remove consideration of it from the ambit of [the plain error standard]." *Johnson*, 520 U.S. at 466; see *Cotton*, 535 U.S. at 632, 633 (citing *Johnson*). In both cases, the omission did not rise to the level of plain error. *Cotton*, 535 U.S. at 632-33, *Johnson*, 520 U.S. at 469. According to these cases, then, *even if an error in a criminal trial might have been structural, it may not require reversal on direct appeal if unpreserved.* See also *Dominguez-Benitez*, 542 U.S. at 81.

If the Washington Supreme Court is affirmed, there is no guarantee that States will follow the *Cotton-Johnson* line of reasoning. States may conclude *either* that (1) a defendant can forfeit an *Apprendi* or *Neder* error, even though it is structural; or (2) that *Apprendi* and *Neder* errors require reversal regardless whether the defendant preserves them. *See, e.g., Martin v. State*, 2005 WL 2811737 at *5 (Md. App. 2005) (structural error requires reversal even if the defendant failed to preserve it) (citing *Sullivan*); *State v. Hill*, 749 N.E.2d 274, 282 (Ohio 2001) (whether unpreserved structural error requires reversal is "arguable").

In addition, States differ in their definition and application of standards of appellate review. For example, Iowa has no "plain error" rule, but has considered issues not

raised at trial if they were "tacitly" considered below or if it would be "expeditious" to review them. *State v. Yaw*, 398 N.W.2d 803, 805 (Ia. 1987). There is no telling how Iowa courts would react to a new structural error. Other States decline to apply plain error to constitutional errors at all. *See, e.g., State v. Mills*, 109 P.3d 415, 417, 421 n.7 (Wash. 2005) (unpreserved instructional omissions or misdescriptions are reviewed for harmlessness); *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005) (overruling prior decisions applying harmless error to unpreserved constitutional errors); *Griego*, 19 P.3d at 7-8. And, some State appellate courts may simply decline to address claims that an error is unpreserved. *See, e.g., People v. Hinojos-Mendoza*, 2005 WL 2561391 at *2 (Colo. App. 2005). Contrary to the view of the dissenters in *Neder*, then, affirming the Washington Supreme Court leaves States free to reverse even for unpreserved *Neder* error.

B. Affirming The Washington Supreme Court Would Permit States To Redefine Structural Error.

Structural errors warrant a presumption that the process by which the jury determines facts is so unfair that its findings are too likely to be incorrect. *See, e.g., Rose*, 478 U.S. at 577; *State v. Allen*, 615 S.E.2d 256, 278 (N.C. 2005) (Martin, J., concurring in part and dissenting in part). By affirming the Washington Supreme Court, however, the Court would mandate reversal even when the defendant *concedes* the missing fact (and therefore no presumption of unfairness or unreliability is warranted). This would mean that *all* impairments of the jury trial right are structural error — not because they warrant a presumption of unfairness or unreliability, but because they threaten "important values that are unrelated to the truth-seeking function of the trial." *Rose*, 478 U.S. at 588 (Stevens, J., concurring in the judgment). This contradicts the maxim that the reversibility of error does not depend on the *nature* of the right violated.

Lane, 575 U.S. at 455-46 (Brennan, J., concurring in part and dissenting in part).

States have already defined their own structural errors. *See, e.g., Hayes v. Commonwealth*, 2005 WL 2674967 at *8 (Ky. 2005) (precluding defense counsel from asking prospective jurors about the effect of defendant's choice not to testify); *State v. Jackman*, 104 P.3d 686, 690-91 (Wash. App. 2005) (instructions including victims' birthdates where victims' age was an element), *review granted*, 122 P.3d 728 (Wash. 2005); *State v. Brown*, 827 A.2d 346, 352 (N.J. Super. 2003) (allowing jury to read victim's testimony in the absence of trial judge). Affirmance in this case would suggest to the States that structural errors are not limited to those justifying a presumption of unreliability; that they may expand "structural error" to include violations of *any* right — even those that do not serve to enhance the fundamental fairness or reliability of the trial.

The result would be chaos. Some states might hold that a violation of the privilege against self-incrimination is structural. See *Rose*, 477 U.S. at 587-88 and n.4 (Stevens, J., concurring in the judgment) (citing *Payne v. Arkansas*, 356 U.S. 560 (1958)); *Fulminante*, 499 U.S. at 288-295 (White, J., dissenting); *State v. Esquivel-Hernandez*, 975 P.2d 254 (Kan. 1999), *disapproved* in *State v. Swanigan*, 106 P.3d 39, 45 (Kan. 2005). Other States will review the erroneous admission of an involuntary confession for harmlessness. *Fulminante*, 499 U.S. at 310. Similarly, some States may decide that erroneous admission of uncharged misconduct evidence is structural error because its effect on the outcome is inherently "unquantifiable and indeterminate," *Sullivan*, 508 U.S. at 282, and the right to be tried only on the charged offense is "basic" to a fair trial. See *State v. Rodriguez*, 575 So.2d 1262, 1266 (Fla. 1991) (requiring bifurcated trial of prior convictions that raise the class level of an offense).

CONCLUSION

The harmless error rule arose out of "widespread and deep conviction" that appellate courts "'tower above [criminal trials] as impregnable citadels of technicality.'" *Kotteakos*, 328 U.S. at 759 (quotation omitted). The Court has often said that reversing for error that has no effect on the judgment "encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Johnson*, 520 U.S. at 470. It also undermines the central purpose of a criminal trial — namely, deciding the "factual question" of guilt or innocence. *Rose*, 478 U.S. at 577. When a jury's failure to determine an element (or sentence-enhancing fact) does not undermine that function, the trial is fair and reliable. *Rose*, 478 U.S. at 578. *Apprendi* and its progeny do not justify reversing course on ninety years of common-sense appellate review, and the burden of correcting *Apprendi* error in *every* case may render courts "unavailable to redress prejudicial legal error." *Allen*, 615 S.E.2d at 288 (Martin, J., concurring in part and dissenting in part). The decision of the Washington Supreme Court should be reversed.

Respectfully Submitted,

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APPENDIX

STATES EXPRESSLY APPLYING *NEDER* TO UPHOLD CONVICTIONS DESPITE THE OMISSION OR MISDESCRIPTION OF AN ELEMENT IN JURY INSTRUCTIONS:

Alabama:

Ash v. State, 843 So.2d 213, 218-19 (Ala. 2002).

Arkansas:

Sasser v. State, 993 S.W.2d 901, 906 - 907 (Ark. 1999) (distinguishing *Sullivan v. Louisiana*).

California:

People v. Cole, 17 Cal.Rptr.3d 532, 573-74 (Cal. 2004).

Colorado:

Griego v. People, 19 P.3d 1 (Colo. 2001) (disapproving cases holding that instructional omission or misdescription is structural error).

Connecticut:

State v. Gooden, 873 A.2d 243, 313 (Conn. App. 2005) (citing *State v. Montgomery*, 759 A.2d 995 (2000) (*Neder* applies to sentence-enhancing facts)).

District of Columbia:

Bellamy v. United States, 810 A.2d 401, 405-07 and n.8 (D.C. 2002).

Florida:

State v. Harbaugh, 754 So.2d 691, 694 (Fla. 2000).

Idaho:

State v. Hansell, 115 P.3d 145, 149 (Id. App. 2005) (citing *State v. Lovelace*, 90 P.3d 298, 304 (Idaho 2004) (*Neder* applies to jury's failure to determine death aggravators)).

Indiana:

Thomas v. State, 827 N.E.2d 1131, 1134-35 (Ind. 2005) (counsel not ineffective for failing to challenge absence of instructions on predicate felony underlying felony murder count, because defendant was convicted of another form of murder and absence of instructions was therefore harmless) (citing *Neder*).

Kansas:

State v. Daniels, 91 P.3d 1147, 1155, 1156 (Kan. 2004).

Michigan:

People v. Mass, 628 N.W.2d 540, 554 n.29 (Mich. 2001) (adopting *Neder* but finding that omission of drug quantity from conspiracy instruction was plain error).

Mississippi:

Kolberg v. State, 829 So.2d 29, 45-51 (Miss. 2002) (disapproving earlier cases holding that instructional omission or misdescription always requires reversal).

Nevada:

Collman v. State, 7 P.3d 426, 449 (Nev. 2000) (overruling *Thompson v. State*, 838 P.2d 452 (Nev. 2000)).

North Dakota:

State v. Flanagan, 680 N.W.2d 241, 243-45 (N.D. 2004).

Oklahoma:

Primeaux v. State, 88 P.3d 893, 908-09 (Okla. Crim. App. 2004).

Rhode Island:

State v. Golembewski, 808 A.2d 622, 624-25 (R.I. 2002).

Tennessee:

State v. Richmond, 90 S.W.3d 648, 657 (Tenn. 2002).

Virginia:

Emmet v. Warden, Sussex I State Prison, 609 S.E.2d 602, 605-06 (Va. 2005).

Washington:

State v. Brown, 58 P.3d 889, 895 (Wash. 2002).

Wisconsin:

State v. Harvey, 647 N.W.2d 189, 198-203 and n.10 (Wis. 2002) (overruling *State v. Leist*, 414 N.W.2d 45 (Wis. App. 1987)).